(2)

No. 88-1258

Supreme Court, U.S.
FILED
FEB 22 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE COUNTY OF DUPAGE, THE BOARD OF COMMISSIONERS OF DUPAGE COUNTY, THE VILLAGE OF LISLE, and THE VILLAGE OF WOODRIDGE,

Petitioners,

v.

LASALLE NATIONAL BANK OF CHICAGO, UNITY VENTURES, and WILLIAM ALTER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

JAMES P. CHAPMAN
Attorney of Record

JAMES P. CHAPMAN
ALAN MILLS
JAMES P. CHAPMAN & ASSOCIATES, LTD.
33 North Dearborn Street
Suite 930
Chicago, Illinois 60602
(312) 263-0789

Counsel for Respondents

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

2/b

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
A. Facts	4
B. Course Of Proceedings In The Instant Case	7
SUMMARY OF ARGUMENT	9
ARGUMENT	10
I.	
THIS CASE DOES NOT INVOLVE ANY UNRESOLVED ISSUE OF FEDERAL LAW ...	10
II.	
DEFENDANTS' ATTEMPT TO CREATE A FEDERAL QUESTION FROM WHAT IS PURELY A QUESTION OF STATE LAW IS WHOLLY UNCONVINCING	11
A. The Instant Case Does Not Present The Type Of Jurisdictional Competency Issue Envisioned By Justice Burger	12
B. In Any Event, There Is No Ambiguity In The State Law Of Res Judicata, At Least As it Applies To This Case	14
III.	
EVEN IF FEDERAL CLAIMS PRECLUSION RULES WERE APPLIED, PLAINTIFFS' CLAIMS WOULD NOT BE BARRED	15

IV.

THE WRIT SHOULD BE DENIED BECAUSE THE ISSUE PRESENTED IS UNNECESSARY TO THE ULTIMATE RESOLUTION OF THE CASE: DEFENDANTS WILL LIKELY LOSE ON OTHER GROUNDS 17

CONCLUSION 18

TABLE OF AUTHORITIES

PAGE

Belcher v. Stengel, 429 U.S. 118 (1976) 18

Corporate West Development Corporation v. Illinois Environmental Protection Agency, No. 79 MR 257, in the Circuit Court of DuPage County, Illinois, Eighteenth Judicial Circuit ..... *passim*

LaSalle National Bank of Chicago v. County of DuPage, 777 F.2d 377 (7th Cir. 1985), *cert. denied*, 476 U.S. 1170 (1986) 2

LaSalle National Bank of Chicago v. County of DuPage, 856 F.2d 925 (7th Cir. 1988) ... 2, 3, 8, 14, 17

LaSalle National Bank v. County of DuPage, 54 Ill. App. 3d 387, 369 N.E.2d 505 (2nd Dist. 1977) 4, 5

Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373 (1985) 3, 9, 10, 11, 12, 13

McNeese v. Board of Education for School District 187, Cahokia, Illinois, 272 U.S. 668 (1963) 16

People ex rel. Scott v. Chicago Park District, 66 Ill. 2d 65, 360 N.E.2d 773 (1976) 17

28 U.S.C. §1341 15

28 U.S.C. §1738 ..... 10, 13

No. 88-1258

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE COUNTY OF DUPAGE, THE BOARD OF COMMISSIONERS OF DUPAGE COUNTY, THE VILLAGE OF LISLE, and THE VILLAGE OF WOODRIDGE,

Petitioners,

v.

LASALLE NATIONAL BANK OF CHICAGO, UNITY VENTURES, and WILLIAM ALTER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioners ("defendants") seek to have this Court consider the holding of the United States Court of Appeals

for the Seventh Circuit[1] that plaintiffs' constitutional claims in this case are not barred, under the Illinois rules of *res judicata*, by a judgment entered against plaintiffs in a state court action. Respondents ("plaintiffs") respectfully submit that this is purely a question of state law and involves no federal question which would merit this Court's attention.

Plaintiffs allege that beginning in 1973 and continuing to at least 1984, defendants engaged in a conspiracy and continuing course of conduct which had as its object depriving plaintiffs of their constitutionally protected right to make reasonable use of their property. While plaintiffs' underlying claims involve fundamental constitutional questions regarding the limits on proper governmental regulation of private property, the issue defendants ask the Court to consider in the instant petition for certiorari is a narrow procedural question: whether the federal constitutional claims plaintiffs assert in the instant action are barred, under the principle of *res judicata*, by a final judg-

[1] The opinion which defendants ask this Court to review is *LaSalle National Bank of Chicago v. County of DuPage*, 856 F.2d 925 (7th Cir. 1988) (sometimes referred to herein as "*LaSalle* III"). This case was before the Seventh Circuit on two previous occasions. In *LaSalle National Bank of Chicago v. County of DuPage*, 777 F.2d 377 (7th Cir. 1985), *cert. denied*, 476 U.S. 1170 (1986), ("*LaSalle* I") the court held that defendants were immune from plaintiffs' claims under Section One of the Sherman Anti-Trust Act because of the "State Action Immunity" doctrine. In an unreported decision dated September 19, 1986 ("*LaSalle* II") the court held that its mandate in *LaSalle* I was not intended to preclude plaintiffs from amending their complaint to assert a claim under the civil rights laws.

ment entered in a state court case[2] which involved one of the many overt acts performed by defendants in furtherance of their unconstitutional conspiracy which is the subject of the instant case.

In *LaSalle* III, the United States Court of Appeals for the Seventh Circuit, applying the now firmly established holding of *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373 (1985), looked to the law of Illinois and concluded that, because the "factual undergirding" of plaintiffs' claims in the instant case and in *Corporate West* were "quite dissimilar", the judgment in *Corporate West* did not, under Illinois law, bar plaintiffs' claims in the instant case (856 F.2d at 933; Def. App. A-16).

In an attempt to transform what is obviously a question of state law into a "federal question" allegedly worthy of the attention of this Court, defendants mischaracterize the facts in the record and distort the procedural history of this case and of *Corporate West*. Without attempting a full recitation of the complex factual and procedural background of this case which is set forth in full in *LaSalle* I and *LaSalle* III, plaintiffs will briefly highlight those facts and proceedings which are directly relevant to the issues defendants raise in the instant petition.

---

[2] *Corporate West Development Corporation v. Illinois Environmental Protection Agency*, No. 79 MR 257 in the Circuit Court of DuPage County, Illinois, Eighteenth Judicial Circuit. As is set forth below, plaintiffs did not initiate this state court case; rather, they intervened in a case begun by an unrelated corporation, Corporate West Development, Inc. Thus, plaintiffs' name does not appear in the caption of that case. For the sake of clarity, the case is referred to as "*Corporate West*" (in italics) while the corporate plaintiff is referred to as "Corporate West Development, Inc." (without italics).

A. Facts

In 1969, plaintiffs acquired approximately 145 acres of undeveloped farm land located in an unincorporated portion of the County of DuPage ("the County") near the western borders of the Villages of Lisle ("Lisle") and Woodridge ("Woodridge"). Plaintiffs' original plans called for development of the property with approximately 268 single family homes, 713 dwelling units of multiple family housing, a commercial center of stores, large open and recreational spaces, and equestrian trails leading to a county forest preserve east of the Greene Farm (plaintiffs' proposed development is sometimes referred to in this brief as "Hobson Greene").

In order to successfully complete Hobson Greene, plaintiffs, like any other property owner, had to arrange for a series of prerequisites, including: (1) zoning which would allow use of the property as proposed in the development plan; (2) water service to provide water for the residents of the development; and (3) a sewage treatment system for disposal of the waste generated by the residents of the development. Each of these prerequisites was subject to the control of one or more of the defendants. Through their concerted action, respondents denied plaintiffs the zoning, sewage, and water essential for their development.

Zoning: In 1970 plaintiffs sought from the County the special use zoning permit essential for their planned development. The permit was granted for one portion of the planned development, but not for plaintiffs' portion. Plaintiffs sought relief in the state courts. The state circuit court found the denial of the permit to be a violation of the Illinois Constitution as well as arbitrary and capricious, and, after seven years of litigation, the decision was upheld on appeal. *LaSalle National Bank v. County of*

DuPage, 54 Ill. App. 3d 387, 369 N.E.2d 505 (2nd Dist. 1977).

Water: In 1978, after plaintiffs finally obtained the needed zoning from the state courts, plaintiffs approached Woodridge to obtain water for the development. However, Woodridge refused to provide water unless plaintiffs agreed to annex the development to Woodridge upon wholly unreasonable terms which bore no reasonable relationship to the costs or burdens of the development. Plaintiffs also approached neighboring Lisle about water; however, Lisle refused to deal with the plaintiffs because the unincorporated land in question had purportedly been allocated to Woodridge under a 1978 agreement between Lisle and Woodridge. As a result of their inability to obtain access to a public water supply, plaintiffs were forced to completely redesign their project and rely upon well water.

Sewer: In early 1979, plaintiffs obtained permits from the Illinois Environmental Protection Agency ("IEPA") for the first two phases of their development (as redesigned) which gave them the right to construct and operate a system of sewage pipes on their property to be connected to a sewage treatment plant operated by the County.

On May 30, 1979, the IEPA placed the Lisle-Woodridge plant on "restricted status"; that is, the IEPA indicated that it would not issue any *new* permits for use of the plant. The IEPA's action, taken alone, would have had no effect on the first two phases of Hobson Greene, as plaintiffs already had valid permits for these phases of the development.

In July, 1979, Corporate West Development, Inc., a developer (unrelated to plaintiffs) of property in DuPage

County, filed an action challenging the IEPA's "restricted status" determination. Defendants quickly settled with Corporate West Development, Inc. and granted it the permit it needed for its development. In the meantime, on September 26, 1979, the IEPA filed a counterclaim in *Corporate West* seeking an injunction which would have the effect of blocking plaintiffs' development. That is, the IEPA sought an order enjoining the County, Lisle, and Woodridge from issuing *any* building permits or connection permits in the area served by the plant, including issuing building or connection permits to developers like plaintiffs which held existing valid IEPA permits. Neither defendants nor the IEPA joined plaintiffs as parties nor did they otherwise give plaintiffs any notice of the proceedings in *Corporate West.*

After an extended period of negotiations, the IEPA, Lisle, Woodridge, and the County agreed upon a certain formula which allowed a limited number of connections by existing permit holders. On August 13, 1980, pursuant to a stipulation entered into by the IEPA, Lisle, Woodridge and the County, defendants caused an order to be entered in *Corporate West* which embodied the discriminatory allocation described above and which enjoined the County from issuing building permits or connection permits to any developer unable to obtain sewage service under the allocation formula, *regardless* of existing valid permits. This Order had the effect of extinguishing plaintiffs' vested rights under their IEPA permits and had the effect of preventing plaintiffs' lawful development of their property.

When plaintiffs learned of the entry of the August 13, 1980 Order in *Corporate West*, they immediately sought (and were granted) leave to intervene and sought to vacate the August 13, 1980 Order as unconstitutional. In

1984, plaintiffs dropped their claim for prospective relief, substituting a claim for damages. In both their original complaint *and* in their 1984 amended complaint, plaintiffs specifically limited their claims in *Corporate West* to the events surrounding entry of the August 13, 1980 Order. Plaintiffs never made any attempt to bring defendants' fifteen year conspiracy or any of defendants' actions relating to zoning and water before the court in *Corporate West.*

In December, 1986, the Circuit Court of DuPage County entered a final judgment in *Corporate West*, finding that plaintiffs lacked standing to challenge the constitutionality of the August 13, 1980 Order.

B. Course Of Proceedings In The Instant Case

During the course of discovery in *Corporate West*, plaintiffs discovered facts from which they concluded that what appeared to be unrelated incidents (zoning, water, sewer) were in fact part of a continuing course of conduct by defendants aimed at blocking plaintiffs' proposed development.

As a result, on October 25, 1982, while they continued their attempt in state court to obtain relief from the August 13 Order in *Corporate West*, plaintiffs filed the instant case in federal court. In contrast to the narrow scope of their complaint in *Corporate West*, plaintiffs' complaint in this case included the entire range of defendants' fifteen year conspiracy, including zoning, water, and sewer. Plaintiffs' initial complaint in this case asserted an antitrust conspiracy. However, the Seventh Circuit held (777 F. 2d 377) that plaintiffs' antitrust claims were barred by the state action immunity doctrine. Following this Court's denial of certiorari (476 U.S. 1170), plaintiffs sought leave

to amend their complaint to assert a civil rights theory. On April 1, 1987, following another appeal to the Seventh Circuit (the order clarifying the court's earlier mandate is unreported), plaintiffs were permitted to file the amended complaint which is the subject of the instant petition. On July 31, 1987, the district court granted defendants' Rule 12(b)(6) motion to dismiss plaintiffs' amended complaint, holding that plaintiffs' claims were barred under the principle of *res judicata* by the final judgment entered in *Corporate West.*

On September 8, 1988, the Seventh Circuit reversed. *LaSalle National Bank of Chicago v. County of DuPage,* 856 F. 2d 925 (7th Cir. 1988). The court initially noted (856 F. 2d at 931-33) that the law of *res judicata* in Illinois was confused and that Illinois courts appeared to apply two different tests interchangeably and without appearing to recognize that the tests were at times inconsistent. However, the court ultimately concluded (856 F. 2d at 933-34) that it need not resolve this ambiguity in the Illinois cases, because plaintiffs' claims in the instant case clearly were not barred by the judgment in *Corporate West, regardless of which Illinois test was applied.* On October 24, 1988, the Seventh Circuit denied defendants' petition for rehearing and rehearing *in banc.*

On October 31, 1988, defendants filed a motion to stay issuance of the court's mandate, on the ground that they intended to file a petition for certiorari. On November 4, 1988, in a highly unusual and extraordinarily decisive order, the Seventh Circuit flatly rejected defendants' request (Pl. App. A-1):

> This case raises no novel question requiring further review in the Supreme Court of the United States. It is simply a fact specific application of principles already established by the Supreme Court and ap-

plied previously by this circuit. Therefore, it is not probable that four Justices of the Supreme Court will vote to grant certiorari in this case. Nor is there a substantial possibility that, if certiorari were granted, the judgment of this court would be reversed.

SUMMARY OF ARGUMENT

Plaintiffs fully concur with the sentiment expressed by the Seventh Circuit in its order of November 4, 1988, quoted in the previous section. This case presents no unresolved issues of federal law; there is no conflict between the Circuit Courts of Appeal; the case involves no question of national importance. This case involves nothing more than a fact specific application of the *res judicata* law of Illinois[3] and is thus not appropriate for consideration by this Court.

Defendants' petition makes a valiant (though completely unsuccessful) attempt to create a federal question out of this state law issue. However, defendants are able to "find" a federal issue only by (1) distorting beyond recognition Justice Burger's concurring opinion in *Marrese*; seizing hold of the Seventh Circuit's *comment* bemoaning the fact that Illinois courts have used two different tests

[3] Perhaps the best evidence that this case involves only state law is the fact that of the 21 cases listed in defendants' "Table of Authorities", seven are cases from the Illinois courts applying the state law of *res judicata* and seven others are Seventh Circuit cases applying the Illinois law of *res judicata*. Of the remaining seven cases, one is *Marrese* and two are the prior decisions in this case.

to decide whether to apply *res judicata*, while ignoring the Seventh Circuit's *holding* that this ambiguity in Illinois law is irrelevant in *this* case, because plaintiffs' claims could not be barred by the *Corporate West* judgment under *either* test; and (3) suggesting a federal *res judicata* rule which would defeat the very purpose of federal civil rights laws—to give plaintiffs a *federal* forum to challenge unconstitutional abuse of power by local officials.

Plaintiffs submit that this case is simply not one which, by any stretch of the imagination, could be considered appropriate for review by this Court.

ARGUMENT

I.

THIS CASE DOES NOT INVOLVE ANY UNRESOLVED ISSUE OF FEDERAL LAW.

In *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373 (1985), this Court held unanimously that the full faith and credit statute, 28 U.S.C. §1738, mandates that federal courts look to state law to determine the preclusive effect of a judgment rendered in state court. In the instant case, defendants claimed that the judgment entered in *Corporate West* by an Illinois court precludes plaintiffs from pursuing their claims in this case. Applying the clear and unambiguous direction of *Marrese*, the Seventh Circuit looked to the law of Illinois and determined that plaintiffs' claims were not barred by the judgment in *Corporate West*.

Marrese's direction is clear and unambiguous. No subsequent opinion has suggested that any member of the Court believes *Marrese* was wrongly decided. No Circuit Court of Appeals has suggested that *Marrese* ought to be reversed or is in any way vague or needs to be clarified. There is no division among the Circuits on the proper interpretation of *Marrese*.

Thus, the only federal question in this case—what preclusive effect a federal court should give to a final judgment rendered by a state court—was decided three years ago in *Marrese*. The only real question in this case is a question of state law—that is, how to apply the Illinois *res judicata* rules to the particular facts in this case. There is simply no reason for this Court to delve into the interstices of the Illinois law of *res judicata*.

II.

DEFENDANTS' ATTEMPT TO CREATE A FEDERAL QUESTION OF LAW FROM WHAT IS PURELY A QUESTION OF STATE LAW IS WHOLLY UNCONVINCING.

In an attempt to avoid the clear holding of *Marrese*, defendants seize upon the concurring opinion of Justice Burger (470 U.S. at 387) where, in a wholly different context, he suggested that *if* state law did not provide an answer to a preclusion question, then the federal courts might be free to fashion their own rule of preclusion. Regardless of the merits of Justice Burger's suggestion, his suggested rule clearly does *not* apply to *this* case. This is *not* the case Justice Burger envisioned nor is the Illinois law of *res judicata* ambiguous as applied to this case.

A. The Instant Case Does Not Present The Type Of Jurisdictional Competency Issue Envisioned By Justice Burger.

Marrese involved the difficult question of whether a state court judgment could act as a bar to plaintiffs' federal antitrust claim, even though plaintiffs *could not* have brought a federal antitrust claim in state court, because the federal courts have exclusive jurisdiction. Justice Burger agreed with the Court that the federal courts must look to state law to answer that question (470 U.S. at 387-88):

> In the circumstances presented by this case, a fair reading of §1738 requires federal courts to look first to general principles of state preclusion law. Those principles control if they clearly establish that the state court judgment does not bar the later federal action: Only recently we reaffirmed in *Migra v. Warren City School District Board of Education*, 465 U.S. 75, 79 L. Ed. 2d 56, 104 S. Ct. 892 (1984), that a federal court is not free to accord greater preclusive effect to a state court judgment than the state court themselves would give it.

However, Justice Burger's concurrence went further than the majority opinion and noted that, because of the peculiar nature of the jurisdictional question presented in *Marrese*, it was likely that state law would *not* provide any answer. That is, state courts are typically courts of general jurisdiction. Thus, Justice Burger considered it probable that the state courts would never have occasion to consider the question of what preclusive effect should be given to a judgment entered by a court of *limited* jurisdiction (470 U.S. at 390). Justice Burger then went on to suggest that in these *limited* circumstances, "a federal rule might be fashioned" (470 U.S. at 390).

Whether or not the hypothetical situation described by Justice Burger will ever come to pass, the instant case is clearly *not* the case Justice Burger envisioned. The instant case does *not* involve a jurisdictional question alien to state court experience. Rather, the instant case involves a straightforward question of how closely the facts of two cases must overlap before *res judicata* bars the second case. This issue has been addressed literally hundreds of times by the courts of Illinois. In fact, to the extent the Seventh Circuit found any ambiguity in state law (a point discussed in the following section), that ambiguity was caused by the fact that there were *too many* Illinois decisions on the question—not all of which were consistent. This is exacly the *reverse* of the scenario envisioned by Justice Burger, where the state courts may not have had *any* occasion to consider an issue.

This distinction is crucial to the validity of Justice Burger's argument. Justice Burger was willing to impose a federal rule *only* where the state's interest was minimal—that is, where the state courts would never have occasion to consider the issue (470 U.S. at 390). In contrast, to apply Justice Burger's rule to the instant case (as suggested by defendants), would permit the federal courts to supplant state law whenever there was any lack of uniformity among the state decisions—regardless of how many times the state courts had grappled with the issue. Such an unforgiving rule, which would allow federal courts to ignore state law whenever there was any inconsistency in state court opinions, would completely undermine the principle of state primacy established by the full faith and credit statute, 28 U.S.C. §1738.

Justice Burger's opinion does not provide an excuse for such a sweeping intrusion into the state law of preclusion. His concurring opinion simply does not apply to the quite different facts of the instant case.

B. In Any Event, There Is No Ambiguity In The State Law Of Res Judicata, At Least As It Applies To This Case.

Not only do defendants seize upon Justice Burger's concurrence and stretch it far beyond Justice Burger's intent, defendants similarly seize upon a comment made by the Seventh Circuit to establish an alleged "ambiguity" in state law.

As noted by defendants, the Seventh Circuit bemoans the complexities of the Illinois rules governing *res judicata* created by the fact that the courts of Illinois have applied two different tests (the "evidence" and the "transactional" test) without recognizing that these tests may yield contradictory results in some cases (856 F. 2d at 930; Def. App. A-11). Defendants seize upon this inconsistency to argue that Justice Burger's "ambiguity" rule applies to this case.

Defendants are wrong. While the Seventh Circuit noted that the two Illinois tests might, in *some* cases, lead to different results, the Seventh Circuit concluded that *this* case was easy because, under *either* test, the judgment in *Corporate West* would not bar plaintiffs' claims. The Seventh Circuit unambiguously concluded (856 F. 2d at 933):

> Thus, under the evidence test, these are two different causes of action. Under the "transactional" approach the same result obtains. The two suits do not arise "from the same transaction, incident, or factual situation . . ."[4]

[4] This holding suggests that even under the broader "same transaction or occurrence" test applied under federal law, the judgment in *Corporate West* would not bar plaintiffs' claims in the instant case.

In other words, while there may be *some* case for which the Illinois law of preclusion would not provide an unambiguous answer, this is not that case.

III.

EVEN IF FEDERAL CLAIM PRECLUSION RULES WERE APPLIED, PLAINTIFFS' CLAIMS WOULD NOT BE BARRED.

Defendants' brief is littered with disparaging references to plaintiffs' alleged "claim splitting" and to plaintiffs' other allegedly abusive and reprehensible tactics. From this litany of alleged misconduct, defendants would have this Court conclude that plaintiffs clearly "ought" to be barred from pursuing their claims in this case.

Plaintiffs respectfully urge the Court to ignore defendants' hyperbole and to instead focus on what actually happened in this case. Plaintiffs did not "choose"—in any meaningful sense of the word—to participate in *Corporate West*. Plaintiffs did not initiate *Corporate West*. They sought to intervene only *after* defendants *used Corporate West* as a vehicle to accomplish their illicit goal of blocking plaintiffs' development by causing the August 13, 1980 Order to be entered by agreement.

While plaintiffs were forced to intervene in *Corporate West* for the limited purpose of obtaining relief from the Order,[5] plaintiffs have, from the beginning, chosen to bring their conspiracy claims in *federal* court (initially under the antitrust laws and, when that claim was foreclosed under the "state action immunity" doctrine, under

[5] Relief plaintiffs could *not* have obtained in federal court because of the anti-injunction act, 28 U.S.C. 1341.

the civil rights laws). Plaintiffs submit that their choice of the federal courts was fully consistent with the intent of Congress in enacting the civil rights laws and that defendants' *res judicata* rule—if adopted by this Court—would be a complete perversion of the principles underlying Section 1983, which was enacted *precisely* to provide plaintiffs with a *federal* forum in which to litigate this federal constitutional claim. *McNeese v. Board of Education for School District 187, Cahokia, Illinois*, 272 U.S. 668, 672 (1963).

According to defendants, plaintiffs erred by not including the full range of their federal claims in their amended complaint in *Corporate West*, filed in July, 1984. However, by July, 1984, plaintiffs had already asserted their broader conspiracy claims in this case. Plaintiffs have always wanted, and continue to want, to adjudicate their federal civil rights conspiracy claims in *federal* court.

Plaintiffs did not "choose" to bring *any* claim in *Corporate West*. Plaintiffs intervened in *Corporate West* only after *defendants* caused an order to be entered in that case which violated plaintiffs' rights. Plaintiffs' intervention in *Corporate West* was always limited and focused exclusively on obtaining relief from that order.

Thus, if defendants' version of *res judicata* were accepted, plaintiffs would have been faced with the untenable choice of either foregoing all opportunity to obtain relief from the illicit *Corporate West* order or foregoing their right to choose a federal forum for their federal claims. The Congress which enacted Section 1983 did not intend to impose such a dilemma on victims of civil rights abuses and the rules of *res judicata* do not require this result.

Plaintiffs properly sought limited relief in state court from one particular wrongful act committed by defendants in the course of their conspiracy while consistently pursuing their broad conspiracy claim in federal court. The principles of *res judicata* do not require that plaintiffs do otherwise.

IV.

THE WRIT SHOULD BE DENIED BECAUSE THE ISSUE PRESENTED IS UNNECESSARY TO THE ULTIMATE RESOLUTION OF THE CASE: DEFENDANTS WILL LIKELY LOSE ON OTHER GROUNDS.

In addition to the question of whether *Corporate West* and the instant case would be considered "for the same cause" under Illinois law, the Seventh Circuit was also faced with the question of whether the judgment in *Corporate West* constituted a decision on the merits. The trial court in *Corporate West* held that plaintiffs did not have standing to assert their claims in that case. The general rule in Illinois is that a decision based on standing does not constitute a decision on the merits. See, *e.g.*, *People ex rel. Scott v. Chicago Park District*, 66 Ill. 2d 65, 360 N.E.2d 773, 776 (1976).

The Seventh Circuit was able to avoid addressing this question because it found that the cases were not "for the same cause" (856 F. 2d at 931, n.4; Pl. App. A-12). However, before this Court could reach this issue presented by defendants' petition—the preclusive effect of the *Corporate West* judgment—the Court would have to first grapple with the question of whether the state court judgment was "on the merits". This Court has often refused to consider cases when resolution of the federal question presented is dependent upon other unresolved questions

in the record. Cf. *Belcher v. Stengel*, 429 U.S. 118, 119-120 (1976).

In other words, in addition to the fact that this case involves no substantial question of federal law which warrants this Court's attention, even the question defendants purport to find is not squarely presented. This provides yet another reason why defendants' petition should be denied.

CONCLUSION

For all of the reasons stated herein, plaintiffs respectfully request that the Court deny defendants' Petition for a Writ of Certiorari.

Respectfully submitted,

JAMES P. CHAPMAN
Attorney of Record

JAMES P. CHAPMAN
ALAN MILLS
JAMES P. CHAPMAN & ASSOCIATES, LTD.
33 North Dearborn Street
Suite 930
Chicago, Illinois 60602
(312) 263-0789

Counsel for Respondents